SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 324

RICHARD SMITH,

Petitioner,

against

R. H. LAWRENCE,
Warden, Georgia State Prison,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To The Honorable The Chief Justice And Associate Justices Of The Supreme Court of The United States:

Your petitioner, Richard Smith, prays that a writ of *certiorari* issue to the United States Circuit Court of Appeals for the Fifth Circuit, to review the judgment of the court entered June 16, 1942, rehearing denied July 20, 1942, affirming the District Court.

And thereupon petitioner respectfully represents:

A

ORIGIN AND NATURE OF CASE

Petitioner, a negro youth of eighteen years of age, was tried in a State Court of Georgia upon a charge of murder. The only evidence offered by the State, in addition to proof

of the *corpus delicti*, was the testimony of a certain negro named Raymond Carter, a self-alleged accomplice, that petitioner hit the fatal blow, and for the required corroboration of testimony of an accomplice which was required under the Code of Georgia, a statement that was extorted by the police from petitioner, was used as a confession. The defense did not object to the use as evidence of the statement in the criminal trial, but relied upon the denial thereof by petitioner, and evidence of an alibi. Petitioner was convicted and sentenced to death. This statement was held as sufficient corroboration under the Code of Georgia, and his conviction was affirmed by the Supreme Court of Georgia. *Smith v. The State, 189 Ga. 169, 5 S. E. (2d) 761.* That after affirmance of his conviction, through different counsel, petitioner applied to a state Court of Georgia for a writ of *habeas corpus*, urging as grounds therefor, that the statement so relied upon for conviction was obtained from petitioner through compulsion, duress and coercion, and because his conviction and sentence was dependent upon said statement he was deprived of life without due process of law as guaranteed him under the Fourteenth Amendment to the Constitution of the United States.

The petition for writ of *habeas corpus* in the State Court, unlike as required by the Federal Statute, was not tried upon sworn testimony with privilege of cross-examination, but tried solely upon affidavits submitted by petitioner and the State of Georgia, and the writ was denied. An appeal to the Supreme Court of Georgia was then taken therefrom, and the denial was affirmed. *Smith v. Henderson, Warden, 190 Ga. 826, 10 S. E. (2d) 921.* Petitioner applied to this Court for a writ of *certiorari* and which was denied. *Smith v. Henderson, Warden, 312 U. S. 698, 85 L. ed. 1132.*

Petitioner having exhausted all available remedies in the State Courts of Georgia, challenged the manner in which his conviction and sentence was procured, as impairment to his right to due process as guaranteed him under the Fourteenth Amendment to the Constitution of the United States, by petition for writ of *habeas corpus* in the United States District Court for the Southern District of Georgia. The writ was denied, but the District Court granted a certificate of probable cause for an appeal from the decision (R. 307). An appeal was taken to the United States Circuit Court of Appeals for the Fifth Circuit, and the denial of the writ was affirmed (R. 322).

B

STATEMENT OF FACTS

The police of Atlanta, Georgia, in an attempt to solve the murder of a night watchman at Atlanta, Georgia, interviewed a negro, Raymond Carter, who was held in jail at Jackson, Georgia, for the murder of a Chief of Police, and who they suspected with respect to the murder of the night watchman at Atlanta. This negro had the name and address of petitioner on him (R. 263).

That after certain questioning of Raymond Carter, he gave a statement that he and petitioner, while in the act of burglarizing a certain store in Atlanta, the night watchman appeared, and who was hit in the head by petitioner with a milk bottle filled with sand. Petitioner was thereupon arrested by the police solely upon this statement, without warrant of arrest, and placed in the City Jail. Petitioner was not charged with the Crime, but held solely for investigation (R. 264). He was told when arrested they

wanted him to identify someone, if he could (R. 203). The police testified they wanted him to identify Carter, and Carter, who they had brought from Jackson, Georgia, to identify petitioner (R. 273). Petitioner was locked in a cell alone on the third floor of the jail to remain for the night. The following morning he was taken to the ground floor into a private office of the Superintendent of Police, and as the Superintendent testified, at that time he "started the investigation" (R. 252). Petitioner was then questioned by the Superintendent of Police, and three other police officers about the crime, and petitioner denied any participation therewith or knowledge thereof (R. 206, 253, 265).

The police had no evidence of whatsoever nature against petitioner, except the statement of the self-alleged accomplice (R. 273), and which, under the code of the State of Georgia, without corroboration was not admissible as evidence against petitioner. Consequently, to indict and try petitioner, it was necessary to obtain a confession from him as evidence to corroborate the statement of the self-alleged accomplice. He was therefore questioned and cross-examined by a number of police officers, admittedly by four at a time, in a private closed office (R. 272). Petitioner repeatedly denied any connection with the crime, or knowledge thereof, and he was questioned by the police as to his whereabouts on the night in question. The police wanted this to check with his denial of being implicated in the crime (R. 265). The captain of Police told him if he could show him that he did not have anything to do with the murder, he would "turn him out of jail" (R. 260).

That after being questioned and cross-questioned as to his whereabouts on the night in question, he was again

locked in the cell alone on the third floor of the jail. The second night while he was so locked in a cell on the third floor of the jail, he saw a policeman hit another negro on the head with his fists and whip him with what looked like a hose, (R. 207, 208). On the third day of his incarceration, following the night he saw this other negro being whipped, he was again brought to the ground floor to be questioned and cross-examined in a closed office. He was again so questioned and cross-examined for several hours by four police officers, and he continued to deny any guilt of the crime, or knowledge thereof. That after repeated denials, the police confronted him with the people who he named in connection with what petitioner stated, in being questioned, as to his whereabouts on the night in question to contradict him (R. 271). Petitioner was told he had to prove that he was not implicated in the crime (R. 260). The police told him that Raymond Carter had told them that he, petitioner, had killed the night watchman, and he denied it (R. 211). He was again asked to tell what he did the night in question, and he repeatedly told the police, and in detail (R. 213, 217). This consumed practically half a day (R. 268).

The police told him they could get him the death sentence on the word of Raymond Carter, the self-alleged accomplice who was held for another murder (R. 211). The Captain of the Police told him to come on and confess, and that they would make it easy on him, because they had all the evidence that they wanted to convict him and give him capital punishment (R. 213). The Captain of Police told him that his father, sister and brother had made statements against him (R. 219). That after this ordeal finally, and as testified herein by one of the officers, after he told petitioner he had sent, or would send for his sweetheart, the

reason therefor apparently being to contradict some statement of petitioner, that then this negro youth, after such continuous grilling, in the language of this officer "*he broke down* and told the story" (R. 259). He was crying during the questioning (R. 213, 260). The police admit in their testimony that "his eyes got watery once or twice" (R. 260).

Petitioner was then again questioned by the police. One of the police officers would say: "Did you not do so and so, and he would answer it" (R. 249), and this was then reduced to narrative form, and petitioner sworn to it (R. 249). The statement appears at page 152 of the record, and wherein participation in the crime is charged against petitioner.

Petitioner testified that he, while in jail, before giving the statement used by the State to convict him, he was refused permission to see a lawyer (R. 211), and he was denied the privilege to see or communicate with his family (R. 211). There is no dispute that he was held in jail without the aid of counsel, family or friends. The only dispute raised as to his being refused his request for a lawyer, but counsel for the State of Georgia only asked one of the three police officers who testified herein the question, if *he* refused him that permission, and he said "no", but none of the other officers involved herein were asked that question. That as to being refused to see or communicate with his family, while being examnied in attempt to get a confession to convict him, his sister testified she went to the jail to see him, but she was refused permission to do so. She testified that "they told me I could not see him" (R. 237). The State offered no evidence to deny this sworn testimony. He therefore was not only held incommunicado without the aid of

counsel, family or friends, but was refused this until the desired statement was obtained from him by the police, after being held incommunicado from a Sunday night until the following Tuesday about noon.

C

QUESTION INVOLVED

Was not the method and practices used by the police in obtaining the statement from petitioner, and which was used in the trial as a confession, and upon which the State of Georgia depended for the verdict, and sentence of petitioner, all as shown herein, a violation of fundamental rights, constituting a deprivation of life without due process of law, as guaranteed petitioner under the Fourteenth Amendment to the Constitution of the United States, rendering the conviction and sentence of petitioner void?

D

REASONS FOR ALLOWANCE OF THE WRIT

I The Circuit Court of Appeals for the Fifth Circuit, in holding that the method and practices of the police in obtaining from petitioner the statement used as a confession, and upon which the State depended for the verdict and sentence of death, did not constitute a violation of fundamental rights, secured petitioner by the due process clause of the Fourteenth Amendment to the Constitution of the United States, is in direct conflict with the applicable principles announced by this Court in the following decisions, to-wit:

Brown v. Mississippi, 297 U. S. 278, 80 L. ed. 682;

Chambers v. Florida, 309 U. S. 227, 241, 84 L. ed. 716;

Canty v. Alabama, 309 U. S. 629, 84 L. ed. 988;

White v. Texas, 310 U. S. 530, 84 L. ed. 1342;

Lomax v. Texas, 313 U. S. 544, 84 L. ed. 1151;

Vernon v. Alabama, 313 U. S. 547, 85 L. ed. 1513;

Ward v. Texas, 86 L. ed. (No. 15 Advanced Sheets) 1101.

II The Circuit Court of Appeals for the Fifth Circuit has failed to ~~apply~~ consider practices and methods denounced by this Court in the Chambers, Brown and White cases, *supra.*

To illustrate the above error, we quote at the lower left from this Court in the Chambers case, *supra*, as to methods and practices condemned by this Court as violative of due process of law, and opposite thereto, we refer to the facts in the instant case, showing similar practices and methods as follows:

"So far as appears, the prisoners at no time during the week were permitted to see or confer with counsel or a single friend or relative."	Petitioner herein was held from a Sunday night until the following Tuesday at noon before he made the statement, and during which time he was not permitted to see or confer with counsel or relative.
"When carried singly from his cell and subjected to questioning each found himself a single prisoner, surrounded in a fourth floor jail room by four to ten men, the county sheriff, his depu-	Petitioner after being held alone in a cell on the fourth floor of the jail, the following morning he was taken therefrom by two detectives, and brought to the Superintendent's office on

ties, a convict guard, and other white officers and citizens of the community."

the ground floor, and there questioned by the Superintendent, two detectives, and other police officers. Petitioner denied any implication in the crime was cross-examined and then returned to a cell and kept alone therein, when the following morning he was again taken to the Superintendent's office, and there again questioned by four police officers.

"Here, the record develops a sharp conflict upon the issue of physical violence and mistreatment, but shows, without conflict, the drag net methods of arrest on suspicion without warrant, and the protracted questioning and cross-questioning of these ignorant young colored tenant farmers by state officers and other white citizens, in a fourth floor jail room, where as prisoners they were without friends, advisors or counselors, and under circumstances calculated to break the strongest nerves and the strongest resistence."

Petitioner, a negro of eighteen years of age, not having completed the third grade, was as the police testified, arrested without warrant of arrest, and solely on suspicion, was incarcerated alone in a cell on the fourth floor without being charged with any offense, was questioned by at least four police officers when on the morning of the third day, and after repeated questioning and cross-questioning, was, as he testified, crying, and as the police admitted, his eyes became watery, when, finally, as one of the officers testified "he broke down and told the story."

Also in the *Chambers* case, *supra*, this Court in referring to the facts therein, and as applicable to the instant

case, stated that the prisoners were held without formal charge and which the Court said:

> "***were such as to fill petitioners with terror and frightful misgivings."

Petitioner herein was held incommunicado from a Sunday night until about noon on the following Tuesday, without being charged with any offense, and solely held for investigation.

III The Circuit Court of Appeals for the Fifth Circuit in holding that the confession herein, upon which the State of Georgia depended for conviction, was not obtained in violation of due process of law, when the undisputed facts show that petitioner was held without formal charge, could not talk to anyone but the police, and held subject to questioning by the police from a Sunday night until about noon the following Tuesday before the confession was obtained, and during which time petitioner was held without the advice of friends or counsel, is in direct conflict with in particular the decision of this Court in *Ward v. Texas, 86 L. ed. (No. 15 Advanced Sheets) 1101*, wherein this Court enumerated methods and practices in obtaining confessions upon which convictions are based as violative of due process of law, two of which are specifically applicable herein, to-wit:

(1) Confessions "extorted from ignorant persons who have been subjected to persistent and protracted questioning."

(2) Persons "who have been unlawfully held incommunicado without the advice of friends or counsel."

IV The Circuit Court of Appeals for the Fifth Circuit upon the facts involved herein, and upon the statement by the Court in its opinon herein as to the facts involved, as follows:

> "The next morning, Tuesday, he (petitioner) was questioned again, and again denied that he participated in the crime. Then after being advised that Raymond Carter had told the officers about the crime, and after being confronted with Carter, Smith (petitioner) told the story." (R. 319)

that in holding that the confession was voluntarily given, on the above statement by the Court alone, is in direct conflict with the decision of this Court in *Bram v. United States, 168 U. S. 532, 42 L. ed. 568*, and the decision of the United States Circuit Court of Appeals for the Eighth Circuit in *Sorenson v. United States, 143 F. 820*, following *Bram v. United States, supra.* The decision of the Circuit Court of Appeals for the Fifth Circuit holding that the confession herein was given voluntarily, is under the facts herein involved, also in direct conflict with the decisions of the Court of Appeals for the District of Columbia, in *Perrygo v. United States, 2 F. (2d) 181*, and the Circuit Court of Appeals for the Fourth Circuit in *Purpura v. United States, 262 F. 473*, both following *Bram v. United States, supra.*

Petitioner annexes a brief thereto.

WHEREFORE, petitioner respectfully prays that this petition for a writ of *certiorari* to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, in the case numbered and entitled on its docket No. 10,107,

Richard Smith, Appellant v. R. H. Lawrence, Warden, Georgia State Prison, Appellee, be granted, and that this cause be certified to this Court for determination, and that the said judgment may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just.

Petitioner further prays that upon consideration of his affidavit filed herein with, that for the reasons therein stated he be permitted to proceed herein in *forma pauperis.*

And your petitioner will ever pray.

Richard Smith,

BY:
M. A. Grace,
Edwin H. Grace
Daniel H. Grace

JOHN D., M. A. & EDWIN H. GRACE,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

OPINIONS BELOW

The opinion of the District Court in denying the writ is not reported, but is found at pages 302-305 of the record. The District Court granted a certificate of probable cause from its decision pending the eventual outcome of appeal

therefrom (R. 307). The opinion of the Circuit Court of Appeals is not reported, but is found at pages 316-321 of the record. A petition for rehearing (R. 323-327) was denied without opinion (R. 328).

II

JURISDICTION

The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. at L. 938) Title 28 U. S. C. A. Section 347(a).

The judgment of the Circuit Court of Appeals affirming the judgment of the District Court was entered June 16, 1942 (R. 322). The petition for rehearing was denied July 20, 1942 (R. 328). A stay of the mandate was granted July 24, 1942, to permit application for writ of *certiorari* (R. 330).

III

STATEMENT

A statement of the essential facts of the case are fully set forth in the accompanying petition under hearing A, and in the interest of brevity the statement is not repeated here.

IV

SPECIFICATIONS OF ERRORS

(a) The Circuit Court of Appeals erred in holding that the statement obtained by the police from petitioner

before the trial, and which the State of Georgia used in the trial as a confession, and relied upon to convict him, was voluntarily given by petitioner.

(b) The Circuit Court of Appeals erred in failing to hold that the said statement obtained from petitioner was obtained from him under compulsion, duress and coercion.

(c) The Circuit Court of Appeals erred in failing to hold that because of the methods and practices used by the police of Atlanta in obtaining the said statement from petitioner, and upon which statement his conviction was based, constituted a violation of a fundamental right of petitioner guaranteed him under the Fourteenth Amendment to the Constitution of the United States, rendering his conviction and sentence void.

(d) The Circuit Court of Appeals erred in affirming the judgment of the District Court.

(e) The Circuit Court of Appeals erred in not reversing the judgment of the District Court.

(f) The Circuit Court of Appeals erred in failing to order that the writ of *habeas corpus* applied for herein be granted petitioner.

V

ARGUMENT

I

The Use In The Trial Of Petitioner Of The Statement Extorted From Him Before Trial, Through Compulsion, Duress And Coercion, As A Confession, And Upon Which The Verdict Is

Based Was Not A Mere Trial Error Or Irregularity, And Waived Because Not Objected To At The Trial, But Constituted "A Wrong So Fundamental That It Made The Whole Proceeding A Mere Pretense Of A Trial And Rendered The Conviction And Sentence Wholly Void," And "The Proceeding Thus Vitiated Could Be Challenged In Any Appropriate Manner."

The use of the statement obtained from petitioner, was not objected to at the trial. The District Court herein in the *habeas corpus* proceedings held that the errors complained of, if error at all, constituted a trial error or irregularity which could and should have been corrected on appeal (R. 305). The Circuit Court of Appeals while stating that it reviewed the record herein, stated that petitioner made no complaint as to the use of the statement as evidence in the trial, nor did he seek review in this Court (R. 30). That because no objection was made to the use of the confession at the criminal trial, if the same was coerced, and upon which the conviction was based, such use thereof was not a mere error, but as said by this Court, in *Brown v. Mississippi, 297 U. S. 278, supra,* wherein a similar issue was raised, "but a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void." Citing *Moore v. Dempsey, 261 U. S. 86, 67 L. ed. 543.* And this Court further stated in *Brown v. Mississippi,* that a conviction and sentence void for want of the essential elements of due process, "the proceeding thus vitiated could be challenged in any appropriate manner." Citing *Mooney v. Holohan, 294 U. S. 103, 79 L. ed. 791.*

In *Mooney v. Holohan, 294 U. S. 103, supra,* cited by this Court as authority that where a proceeding vitiated

for want of the essential elements of due process could be challenged in any appropriate manner, the use of petition for writ of *habeas corpus* in the federal court against a conviction and sentence in a state court was approved, provided that petitioner exhausted all available remedies as provided by that state. ~~be exhausted.~~ That then, and under such circumstances, the petitioner could challenge his conviction and sentence for deprivation of life or liberty without due process of law. That *habeas corpus* in the federal court under such circumstances is available, see also *Moore v. Dempsey, 261 U. S. 86, 67 L. ed. 543*, cited in *Brown v. Mississippi, supra*, and *Frank v. Mangun, 237 U. S. 309, 59 L. ed. 969.*

That where the claim, as in the instant case, that the statement was obtained in violation of due process of law, the federal court will determine the validity of the claim, and as this Court in *Lisenba v. California, 86 L. ed. (Vol. 3 Advanced Sheets) 179, 189*, said "The performance of this duty cannot be foreclosed by the finding of a court, or the verdict of a jury."

Petitioner herein exhausted all available remedies in the State Court of Georgia, and the proceeding herein by petition for writ of *habeas corpus* is open to him, and this Court will determine the validity of his claim.

II

Due Process Of Law Requires Observance Of Fundamental Fairness Essential To The Concept Of Justice And Is Violated When A Coerced Confession Is Used As A Means Of Obtaining A Verdict Of Guilty.

In *Lisenba v. California, 86 L. ed. (No. 3 Advanced Sheets) 179,* this Court at page 188 said:

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complanied of must be of such quality as necessarily prevent a fair trial. Such unfairness exists when a coerced confession is used as a means of obtaining a verdict of guilt. We have so held in every instance in which we have set aside for want of due process a conviction based on confession."

That without the statement of petitioner, he could not have been indicted or tried, and upon which his conviction was based as the required corroboration under the Code of Georgia. Also, this confession was used as sworn testimony at his trial, and which petitioner could not contradict under oath. The petitioner herein was prevented under the Code of Georgia of 1933 Sec. 38-415 from testifying under oath in his behalf. See *also Roberts v. State, 189 Ga. 36.*

That the conviction of petitioner herein was dependent upon the written statement obtained from and used as a confession, we quote from the opinion of the Supreme Court of Georgia on appeal from the conviction, *Smith v. The State, supra,* as follows:

> "T. H. Herd, deceased, was a night watchman employed by several stores located at Rhodes Center in Atlanta. He was found early on the morning of October 16, 1938, in an unconscious condition and seriously injured, lying in the street

somewhere near these stores. The wound from which he was suffering, and from which a few hours he died, had been made by a blow upon the head from some blunt instrument which produced a concussion of the brain. *The State relied for a conviction on the testimony of the alleged accomplice, Raymond Carter, a written statement by the accused made before the trial, and which was presented as a confession made by defendant, and proof of the corpus delicti.*" (Emphasis ours.) And the Court therein further said:

"At the outset the defendant contends that his conviction was without evidence to support it. The testimony of Raymond Carter, defendant's accomplice, is sufficient to authorize a verdict of guilty, if the record shows corroborating circumstances sufficient to dispense with the requirements of the Code No. 38-121, that there be no conviction of felony on the testimony alone of an accomplice. *The State contends that the requisite corroboration was supplied by a sworn statement made by the defendant before his trial, in which he admitted participation in the crime.* Counsel for the defendant urge upon us the point that this statement does not amount to a full confession of the crime, and therefore is insufficient." (Emphasis ours.)

III

The Practices And Methods Used By The Police To Obtain The Statement From Petitioner Were Such As Has Been Denounced By This Court As Constituting Denial Of Due Process Of Law.

In the petition herein we have referred to practices and methods denounced by this Court in *Chambers v. Flor-*

ida, 309 U. S. 227, supra, and referred to similar methods and practices used by the police herein under D II, to which we again call attention. Such methods and practices as arresting without warrant solely upon suspicion, and holding in custody for a period of time from a Sunday night until the following Tuesday at about noon, during which time petitioner could not act on his own volition, but compelled to answer the questions of the police forcing him to give alibis, and they would go and get statements from the people therein named, and bring in some to confront petitioner to contradict him, all to break down the resistance of petitioner and leave him at the mercy of his inquisitors. That during this period of time he could talk to no one but the police, held incommunicado, without formal charge of any crime, without family, counsel, or a single friend when finally, the police accomplished their object and broke down the resistance and as testified by the Captain of Police finally "he broke down and told the story."

Such methods and practices to obtain confessions to be used to convict prisoners, was severely denounced by this Court in *Chambers v. Florida, 309 U. S. 227, supra.* Methods and practices used by the police to break down the resistance of prisoners to make confessions or statements used as confessions had been previously denounced by this Court in *Brown v. Mississippi, 297 U. S. 278, supra.* That following *Chambers v. Florida,* this Court denounced such methods and practices in *Canty v. Alabama, 309 U. S. 629, supra; White v. Texas, 310 U. S. 530, supra; Lomax v. Texas, 313 U. S. 544, supra; Vernon v. Alabama, 313 U. S. 547, supra.*

Again in *Ward v. Texas,* the latest decision of this Court, decided June 1, 1942 86 L. ed. (No. 15 Advanced

Sheets) 1101, in condemning such unfair practices as sometimes used by the police to obtain confession to be used to convict prisoners, stated instances wherein this Court set aside convictions based upon confessions, citing the above cases, and enumerated circumstances that required reversal of convictions as involving violation of due process of law, two of which are applicable to the instant case, to-wit:

1. Where confessions are extorted from ignorant persons who have been subjected to persistent and protracted questioning.

2. Where persons who have been unlawfully held incommunicado without advice of friends or counsel.

That in view of the foregoing decisions of this Court, the decision of the Circuit Court of Appeals herein, in holding that the manner in which the statement from petitioner was obtained, did not constitute a violation of due process of law, is in direct and irreconciliable conflict therewith, and upon an important question of general law.

IV

The Circuit Court Of Appeals In Affirming The Judgment Of The District Court Denying The Writ Of Habeas Corpus Giving As Reason Therefor That The Statement Was Voluntarily Given By Petitioner Thereby Decided An Important Question Of Law In Conflict With The Weight Of Authority.

We will not repeat the circumstances under which the statement was obtained by the police. The Circuit Court

of Appeals in referring to certain of the facts and circumstances surrounding the obtaining of the statement said:

> "The next morning, Tuesday, he was questioned again, and again denied that he participated in the crime. Then after being advised that Raymond Carter had told the officers about the crime, and after being confronted with Carter, Smith (Petitioner) said he would tell the truth. He then told the story that was incorporated in his signed statement" (R. 319).

That omitting other very material conceded facts, the fact that petitioner, as stated by the Circuit Court of Appeals had been held in custody by the police, denied that he participated in the crime, and again denied it, and being then advised by the police that Raymond Carter, who was also held in custody, had told the police that he, petitioner, had told the officers about the crime, and petitioner being then confronted by Carter, such impelled petitioner to make a statement, which otherwise he would not have done. Placing a prisoner in such position, and especially, as the conceded facts show, petitioner had been told that Carter had told the police that he, petitioner, committed the murder, has been held by this Court as such influence to constitute a statement thereafter made involuntarily. We refer to the decision of this Court in *Bram v. United States, 168 U. S. 532, 42 L. ed. 568.* In that case there was involved a seafaring man of mature age who had been a first mate, and who acted as captain of a ship. He was suspected of having committed murder on board ship, and upon arrival at an American port was placed in custody of detectives. Another member of the crew also was held in custody upon suspicion. That while Bram was held in custody he gave a statement that was used against him in his trial, and the

question determined by this Court was whether or not it was voluntary. There was no evidence that any physical torture was administered, nor any threats made that such would be done to Bram. The issue involved was as to whether or not the statement given under the circumstances as follows was voluntary. As to this, this Court quoted from the testimony of the detective, as follows:

> "When Mr. Bram came into my office I said to him: 'Bram, we are trying to unravel this horrible mystery!' I said: 'Your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder.' He said: 'He could not have seen me. Where was he?' I said: 'He states he was at the wheel.' 'Well,' he said, 'he could not see me from there.' "

This Court in the above case, rendered what is very often cited and referred to by federal and state courts in determining a question as to whether or not a confession was voluntary, as a very authoritative opinion. American and British authorities were discussed therein, and this Court concluded that the statement of the detectives to the prisoner held in his custody, that some member of the crew saw the prisoner commit the murder, no doubt created an influence on the prisoner, and as the law cannot measure the force of the influence, or decide upon the effect upon the mind of the prisoner, the statement then given by the prisoner must be held involuntary.

The facts and circumstances in the *Bram* case, are similar to certain of the facts and circumstances in the instant case as found by the Circuit Court of Appeals, but the Circuit Court of Appeals held herein that the statement

was voluntarily given, a decision in direct and irreconcilable conflict with the decision of this Court in the *Bram* case.

In *Sorenson v. United States, 143 F. 820*, the Circuit Court of Appeals for the Eighth Circuit referred to the authoritative opinion of Mr. Justice White in *Bram v. United States, supra*, and held that a statement by the police officer to a prisoner, that he had an absolutely good case on him, that this alone was "legally sufficient to engender the mind of the accused hope or fear in respect of the crime charged, and which would render a subsequent confession involuntary and inadmissible as evidence."

In *Purpura v. United States, 262 F. 473*, the Circuit Court of Appeals for the Fifth Circuit in following the *Bram* case, *supra*, held:

> Where defendant, charged with stealing a package from the post office, where he was employed, was taken in charge by five inspectors and held 24 hours, without being permitted to communicate with friends or procure counsel, being compelled to sleep in the room with one of them, and being told that they believed him guilty and had evidence which made it look bad for him, a confession, written by the inspectors, but signed by him at the end of that time, held involuntary.

The decision of the Circuit Court of Appeals for the Fifth Circuit upon the face of its opinion herein, decided an important question of general law, contrary the decision of this Court in the *Bram* case, *supra*, and contrary to the above decisions of the Circuit Court of Appeals for the Eighth and Fourth Circuits, and upon which holding af-

firmed the judgment of the District Court in denying the writ of *habeas corpus.*

V

It Is Respectfully Submitted That The Writ Should Be Granted And The Decision Of The Circuit Court Of Appeals Be Reversed, With Instructions That The Writ Of Habeas Corpus Applied For By Petitioner Be Granted.

We quote from the opinion of this Court in *Chambers v. Florida, 309 U. S. 278, supra,* wherein practices and methods were used, as in the instant case, to break down the power of resistance of the prisoners and leave them at the mercy of their inquisitors, and as to which this Court said:

> "To permit human lives to be forfeited upon confessions thus obtained would make of the constitutional requirement of due process of law a meaningless symbol."

Respectfully submitted,

M. A. GRACE,

EDWIN H. GRACE,

DANIEL H. GRACE,

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Counsel for Petitioner.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1942

No. 324

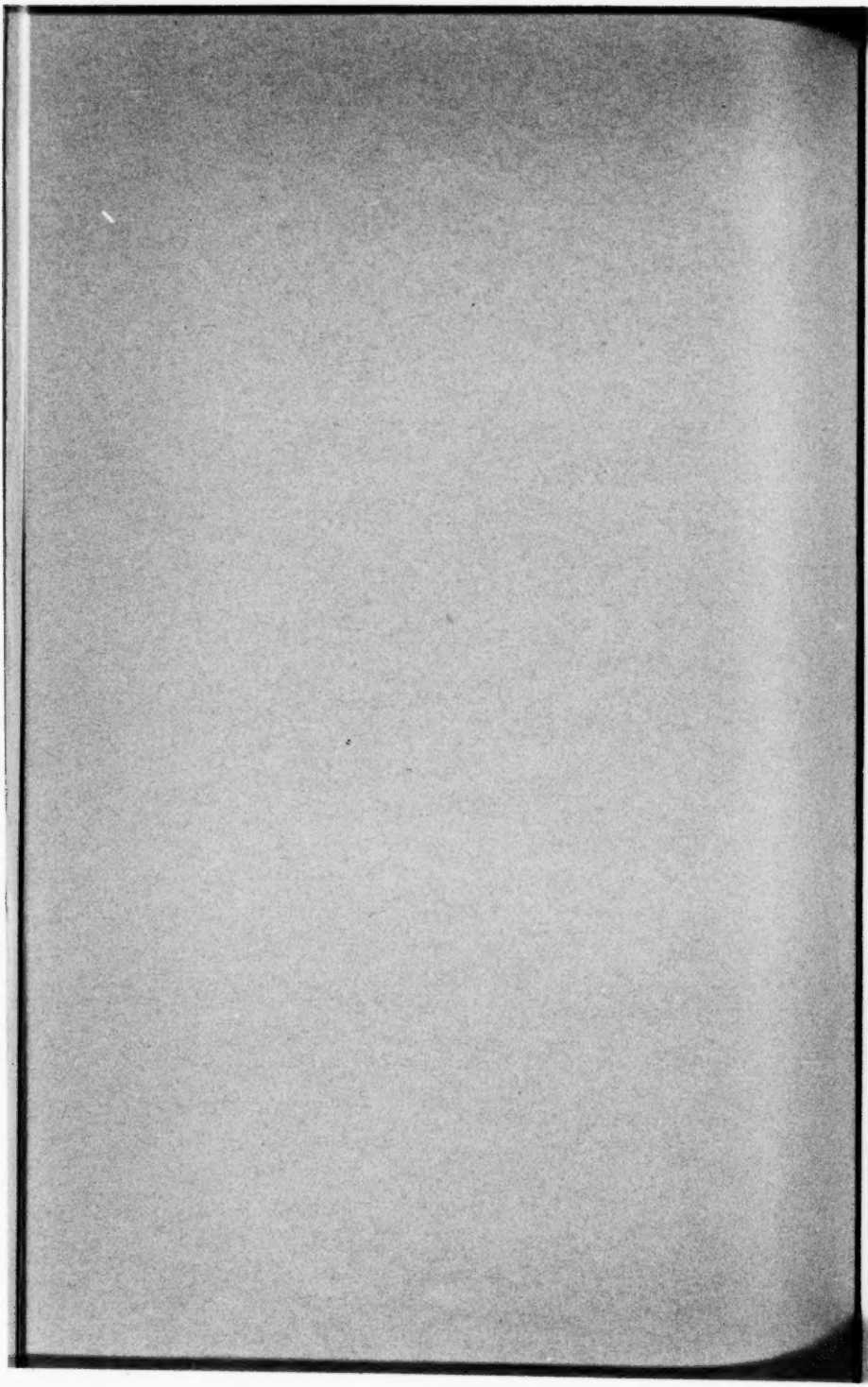
RICHARD SMITH,
Petitioner,

v.

R. H. LAWRENCE,
Warden, Georgia State Prison,
Respondent.

BRIEF OF R. H. LAWRENCE, WARDEN, GEORGIA STATE PRISON, RESPONDENT, IN OPPOSITION TO GRANT OF WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

JOHN A. BOYKIN,
Solicitor General,
QUINCY O. ARNOLD,
Assistant Solicitor General,
Counsel for Respondent,
Atlanta, Georgia.



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AUTHORITIES

PART ONE

STATEMENT OF FACTS

The petitioner, twenty-two years old in July, 1941, according to his testimony (R. 202), was indicted and convicted in the Superior Court of Fulton County, Georgia (R. 22-23) for the murder of T. H. Herd, a nightwatchman, during a liquor store burglary, which occurred on October 16, 1938. After petitioner's conviction, he was sentenced to death on December 13, 1938.

At the trial of petitioner, Raymond Carter, jointly indicted with him, testified that he and petitioner were engaged in the burglary of a liquor store, that he was watching for petitioner, that the nightwatchman came up and petitioner hit the watchman over the head with a milk bottle filled with sand (R. 74-75). Carter further testified that he, Carter, was already under sentence of death for killing a policeman at Jackson, Georgia. (R. 76-77).

Confession of petitioner was also introduced (R. 152) in which confession petitioner said that he broke into the liquor store, and after looking into the cash register and finding it empty, took three pints of liquor from the store, and came out. Petitioner further stated in his confession that after he came out of the liquor store the nightwatchman came up, told him to stop and pointed a pistol at him.

Then Raymond Carter, who was watching for petitioner, according to this confession, came out of an alley and hit the watchman in the head with a milk bottle filled with sand.

Motion for new trial was overruled on April 29, 1939 by Honorable Paul S. Etheridge, Judge, Superior Court (R. 32) and upon appeal to the Supreme Court of Georgia the sentence of the lower court was affirmed. **Smith v. State,** 189 Ga. 169. Subsequently petition for writ of habeas corpus was filed in the City Court of Reidsville, Georgia, upon substantially the same grounds now under review in the present proceeding. Said petitioner alleging that he was being deprived of his life without due process of law as the confession introduced at his trial was not voluntary and was coerced. (R. 46-55).

The writ was denied on May 13, 1940, by Honorable M. W. Eason, Judge of said court, (R. 191-192) by judgment, which was on appeal to the Supreme Court of Georgia affirmed. **Smith v. Henderson, Warden,** 190 Ga. 886.

Petition for rehearing was denied and thereupon petitioner applied to the United States Supreme Court for a writ of certiorari, which was denied March 10, 1941. **Smith v. Henderson, Warden,** 312 U. S. 698.

Petitioner, then on May 20, 1941, filed a petition

for writ of habeas corpus in the District Court of the United States for the Southern District of Georgia. (R. 2-16). This petition being almost a duplicate of the one, set forth above, filed to the City Court of Reidsville, Georgia.

Answer of respondent, R. H. Lawrence, Warden, (R. 16-196) was filed denying allegations of petition and pleading that the matters alleged in petition had already been adjudicated against petitioner by a court of competent jurisdiction, the City Court of Reidsville, Georgia, and attaching as exhibits to said answer a complete exemplification of all proceedings from said court. (R. 33-196).

A hearing was had in Savannah, Georgia on said habeas corpus, on July 18-19, 1941, before Honorable E. Marvin Underwood, United States Judge Designate for Southern District of Georgia, at which time testimony was taken in behalf of petitioner and respondent (R. 202-283) and petitioner testified at length in his own behalf (R. 202-231), claiming officers hollered in his ear, threatened to have him beaten and that he saw an officer strike another prisoner.

At this hearing respondent placed upon the witness stand all the officers, who questioned petitioner and who were named by him as inquisitors, except Johnson, who was dead. They testified (R. 241-274) that the confession was voluntary and that

no violence was used, nor threats, nor promises of any kind made, and that the questioning was not frequent, nor of long duration. That they would ask petitioner where he was and who he was with at the time of the murder of Mr. Herd, then go out and investigate the truth or falsity of petitioner's statement, and upon finding it to be false would confront petitioner with the results of their investigation; after being confronted two or three times with the results of the officers' investigation of his statements to them, petitioner said he would tell the truth about it and confessed to the crime with which he was charged. (R. 254-255).

At the conclusion of the habeas corpus hearing the court reserved its decision and on July 30, 1941 passed an order discharging the writ of habeas corpus and remanding petitioner to custody of respondent. (R. 302-305). An appeal was taken to the U. S. Circuit Court of Appeals for the Fifth Circuit and on June 16, 1942 the denial of the writ was affirmed. Motion for rehearing was denied on July 20, 1942.

PART TWO

ARGUMENT

Petitioner's claim of coercion, threats

and duress stands upon his uncorroborated testimony.

The outstanding question presented in this case is: was the confession of petitioner obtained by coercion, threats and duress? To substantiate this charge we have the uncorroborated testimony of the petitioner alone, a man we say of bad character, by reason of his previous conviction of burglary and six year sentence in 1935 for the same (R. 226) and, who, at the date the crime was committed, was on parole from such sentence, (R. 204) and who was engaging in shady transactions, such as aiding his accomplice, Raymond Carter, jointly indicted with him for murder of Mr. Herd, in the sale of certain cigarettes which he well knew, or had reason to know, were stolen. (R. 229-231).

All testimony of petitioner was refuted by the officers that he named in said testimony as having abused him, cursed him, shouted at him and threatened him, except Officer M. B. Johnson, who according to testimony adduced in this case, has been dead for a year or two. (R. 242).

We deny the generalities set forth in the statement in the petition for certiorari concerning the circumstances surrounding the confession of Richard Smith. We deny that petitioner was held incommunicado and denied the privilege of seeing or communicating with counsel, family and friends

from Sunday night until the following Tuesday, about noon, as he alleges. The Record shows there were five officers involved in this case, Superintendent McKibben, of Detectives, who was only called in to hear statement of petitioner, Ben Lyons, who only typed the statement, Captain Seabrook, head of the Fingerprint Department, who fingerprinted and photographed petitioner and assisted in questioning him, and Detectives D. L. Taylor and M. B. Johnson, the last named now dead, who were assigned to the case and who took the lead in investigating it. Mr. Taylor, the only living officer in position to know all the facts, testified (R. 265) that he did not keep petitioner from getting a lawyer until he had confessed, nor did he tell, nor hear anyone tell petitioner he could not see his family until he had confessed.

It is true that sister of petitioner testified (R. 237) "They told me I could not see him." It can be readily seen that there was no way to rebut this testimony as the word "they" could have meant any one of the five hundred or more officers of the Atlanta Police Department and it would have been manifestly impossible to close the Department, while the hearing at Savannah on petition for habeas corpus was taking place, and bring all of the officers of the Atlanta Police Department some three hundred miles to Savannah and put them on the witness stand one by one. This is the only way that the re-

spondent could have contradicted or denied this testimony.

Examination of record shows that the questioning of petitioner was conducted in a fair and orderly manner.

An examination of the record in this case shows (R. 183-189), (R. 202-274) that Richard Smith was arrested about 11:30 P. M. on a Sunday night, November 13, 1938, and was locked up that night without questioning; that the next day about 9 A. M. he was questioned, and during that day was questioned off and on, not continuously, by several detectives of the City of Atlanta, who would stop and go out and investigate things which Richard Smith said to them, and would later question him some more about the results of their investigation; that Richard Smith denied his guilt on that first day of questioning, making a number of statements to the detectives which they investigated and found to be false; that the questioning did not continue into the night; that on the morning of the second day on which questioning took place (Tuesday, November 15, 1938) Richard Smith confessed about 10 or 10:30 A. M.; that he did so freely and voluntarily; that Richard Smith found that his accomplice, Raymond Carter, had confessed, and also found that the police had discovered by investigations that his previous statements to them, concerning his movements and his whereabouts at the time of the homicide, were false; that

he confessed because he decided to unburden his mind of the truth; that this confession, first made orally to Captain Seabrook, of the Police Department, was then reduced to writing by a typist who was called into the room; that Richard Smith told the typist the things to put into the written statement, being asked questions during the typing, but only Richard Smith's statements being put down; that the confession was not made under any circumstances calculated to incite terror in the prisoner (cf. **Chambers v. Florida,** 309 U. S. 227) and not when his mind was worn out by any long and sustained questioning, but only after a reasonable questioning in which the prisoner voluntarily participated.

We respectfully submit that if the precedent is set by the Federal Courts of releasing all persons convicted of crime in the state courts, upon such persons uncorroborated claim that the confessions used against them in their trials were coerced, all such persons would claim it and the judgments of the state courts in criminal cases would soon become mere nullities.

It must be also remembered that the evidence of the State against petitioner, in which case petitioner was convicted, did not depend upon petitioner's uncorroborated confession alone, but also rested upon the testimony of Raymond Carter, the accomplice. (R. 71-82).

Notwithstanding petitioner's claims of threats and duress, he continued to claim that not he, but his accomplice, struck the blow killing the watchman, which was at variance with accomplice's sworn testimony.

The witness, Carter, and petitioner were in agreement as to the breaking of the liquor store and killing of the watchman, and that it was a joint enterprise; the only difference between the two was that each claimed the other struck the fatal blow.

We submit that here is another weakness in this claim of coercion by petitioner, that while he says he was telling the officers anything they wanted him to, on account of fear of being beaten, yet he never did confess to striking the blow that killed Mr. Herd, but on the other hand insisted that the blow was struck by Raymond Carter, who was watching for him, (R. 152) notwithstanding the fact that he had been confronted with Raymond Carter and Raymond Carter had told petitioner to his face that he was the one who struck down Mr. Herd. (R. 83). Why, if petitioner was willing to agree to anything and say anything that the police officers wanted him to, was he able to hold out on this particular point which was material to the case? We say that this is strong evidence against petitioner: that he was not coerced in any way at the time he

signed the confession.

Petitioner was not represented at his trial by appointed counsel, but by competent and able counsel of his own choosing, who did not object to introduction of his confession.

Also, why when petitioner was represented at his trial in the state court by competent and able attorneys, who were employed by him and not appointed by the Court (R. 304-305), was not objection made to the introduction of the confession (R. 91), (R. 98) on the grounds that it was involuntary and coerced?

Respondent contends that this is strong evidence that no force nor coercion was used and that petitioner's present claim of coercion is but an afterthought.

There is all the difference in the world between the facts in this case, as shown by the record, and facts in cases cited by petitioner.

Petitioner relies strongly on the cases of **Chambers v. Florida,** 309 U. S. 227; **White v. Texas,** 310 U. S. 530; **Ward v. Texas,** 86 L. ed (No. 15 Advanced Sheets) 1101; and **Brown v. Mississippi,** 297 U. S. 278. We say that there is all the difference

in the world between these above cited cases and the case at bar. No such case has been made out by petitioner as was made out by the records in the above stated cases.

No continuous questioning was shown. No night questioning was shown. No questioning over a period of many days was shown.

There were no circumstances of surrounding "terror" shown, as in the Chambers case.

The crime was not freshly committed and there was no aroused populace to mutter angry implications of threats. (cf. page 230 of Chambers decision). . .

There was no drag-net arrest of thirty to forty negro suspects by the police in an effort to show the aroused populace that arrests were being made for the crime. (cf. page 230 of Chambers decision).

There was no late night vigil, no 2:30 A. M. questioning, no confession "just before sunrise" as in the Chambers case. . .

The following seems to be the gist of the Chambers case which caused it to be reversed: (this being quoted from page 239 of the Chambers decision:)

> "For five days petitioners were subjected to interrogations culminating in Sat-

urday's all night examination. Over a period of five days they steadily refused to confess and disclaimed any guilt. The very circumstances surrounding their confinement and their questioning without any formal charges having been brought were such as to fill petitioners with terror and frightful misgivings. Some were practical strangers in the community; three were arrested in a one-room farm tenant house which was their home; the haunting fear of mob violence was around them in an atmosphere charged with excitement and public indignation. The rejection of petitioner Woodward's first 'confession', given in the early hours of Sunday morning, because it was found wanting, demonstrates the relentless tenacity which 'broke' petitioner's will and rendered them helpless to resist their accusers further. To permit human lives to be forfeited upon confessions thus obtained would make of the constitutional requirements of due process of law a meaningless symbol.''

We have incorporated the above from the Chambers decision in order that it might be clearly seen how far short of this was the case made out by petitioner.

In the case of **White** v. **Texas,** supra., the

facts in said case, as set out in the opinion of this court on pages 532 and 533, show that many times the prisoner was removed from jail and driven out on the road and then off the road by Texas Rangers, which was admitted by the State, and at which times the prisoner claimed he was whipped, which the State denied, and that the night of the alleged confession the Rangers went in and out of the eighth floor of the jail, with the elevator locked, where petitioner was interrogated from approximately 11:30 P. M. to 3 or 3:30 A. M., the original confession being reduced to writing after 2 A. M.

In **Ward v. Texas,** supra., the prisoner was moved from town to town, by day and night, and told of threats of mob violence and continuously questioned. In addition to the above, the prisoner claimed he was whipped and burned and there was other testimony to substantiate the latter claim.

The recital of facts, as set out in the opinion of this Court in **Brown v. Mississippi,** supra., is from beginning to end a story of extreme cruelty towards the prisoner and of "man's inhumanity to man." According to the record in this case, on pages 281-282, several negroes were arrested for murder. A rope was put around the neck of one of the defendants, then he was hung to the limb of a tree, then let down, tied to the tree and whipped.

Two other defendants, including Brown, the

petitioner in this case, after being incarcerated in jail, were made to strip, laid over chairs and their backs cut to pieces with a leather strap with buckles on it. These defendants were further given to understand that the whipping would continue until they confessed.

In **Pierce v. United States**, 160 U. S. 355 (3), the United States Supreme Court held, in an appeal from a death penalty conviction of murder, in an Arkansas court:

> "Confessions are not rendered inadmissible by the fact that the parties are in custody, provided that such confessions are not extorted by inducements or threats." (Citing **Hopt v. Utah**, 110 U. S., 574, 583; **Sparf v. U. S.**, 156 U. S. 51, 55.)

Sparf v. U. S. 156 U. S., 51 held:

> "Confinement or imprisonment is not in itself sufficient to justify the exclusion of a confession, if it appears to have been voluntary, and was not obtained by putting the prisoner in fear or by promises; telling the prisoner to tell the truth, is not offering to him an inducement to make a confession."

Three issues before this Court:

(A) Was the confession obtained by

duress?

(B) Have not the issues involved herein already been adjudicated?

(C) Is this not an attempt to have the writ of habeas corpus perform the functions of a writ of error?

Respondent respectfully submits that there are three issues before the court in this case:

(1) Whether or not the confession of Richard Smith was obtained through threats and duress?

(2) Have not the issues set up in the petition in the present case already been decided against petitioner by judgments of the City Court of Reidsville, the Supreme Court of the State of Georgia, and the Supreme Court of the United States?

(3) Should not petitioner have taken a direct appeal to the Supreme Court of the United States from the ruling of the Supreme Court of Georgia denying him a new trial, instead of attacking the judgment collaterally by habeas corpus proceeding? Respondent contends that petitioner is attempting to have the writ of habeas corpus perform the functions of a writ of error?

As to the first issue herein involved, petitioner's claim of duress and threats in obtaining his confess-

ion, we say that the burden of proof was upon him to so show, and that he has not carried the same, in accordance with the ruling of this Court in **Walker v. Johnson, Warden,** 312 U. S. 275 (5):

> "On a hearing in habeas corpus, the prisoner is under the burden of proving by a preponderance of evidence the facts which, he alleges, entitle him to a discharge."

Would not the fact that the same issues were raised and adjudicated against petitioner in a previous habeas corpus be of itself sufficient for the Court to refuse him the relief he seeks?

As to the second issue, if it be conceded that this court is not bound by the adjudication in the City Court of Reidsville of the same issues raised in the present petition, we say that the decision of the City Court of Reidsville, which was affirmed by the Supreme Court of the State of Georgia and certiorari denied by the Supreme Court of the United States, should not be lightly cast aside, but should be given careful consideration and due weight and that the showing that petitioner's contentions had already been adjudicated against him, as above set out, would in itself be enough for the court to refuse him the relief that he seeks.

In **Salinger v. Loisel**, 265 U. S. 230, in the opin-

ion of the Court, it was held:

> "But it does not follow that a refusal to discharge on one application is without bearing or weight when a later application is being considered. In early times when a refusal to discharge was not open to appellate review, courts and judges were accustomed to exercise an independent judgment on each successive application, regardless of the number. But when a right to an appellate review was given the reason for that practice ceased and the practice came to be materially changed, just as when a right to a comprehensive review in criminal cases was given the scope of inquiry deemed admissible on habeas corpus came to be relatively narrowed."

Then in the same decision, on page 232, it was held:

> "Here the prior refusal to discharge was by a court of coordinate jurisdiction and was affirmed in a considered opinion by a Circuit Court of Appeals. Had the District Court disposed of the latter applications, on that ground, its discretion would have been well exercised and we should sustain its action without saying more."

There was an extensive discussion of this same

subject in a habeas corpus case which went up to the Supreme Court of the United States on appeal from the United States District Court for the Northern District of Georgia, that of **Frank v. Manghum,** Sheriff of Fulton County, Georgia, 237 U. S., 309. In the syllabus of said decision, on page 310, the Court held as follows:

> "Although petitioner's allegation that mob domination existed in the trial court might, standing alone and if taken as true, show a condition inconsistent with due process of law, if the record in the habeas corpus proceedings in the Federal Court also shows that the same allegations had been considered by the state court and upon evidence there taken but not disclosed in the Federal Court, had been found to be groundless, that finding cannot be regarded as a nullity but must be taken as setting forth the truth until reasonable ground is shown for a contrary conclusion."

We also wish to call attention to excerpts of the opinion of the court set out as follows:

Page 329:

> "It follows as a logical consequence that where, as here, a criminal prosecution has proceeded through all the courts of the

state, including the appellate as well as the trial court, the result of the appellate review cannot be ignored when afterwards the prisoner applies for his release on the ground of a deprivation of Federal rights sufficient to oust the State of its jurisdiction to proceed to judgment and execution against him. This is not a mere matter of comity, as seems to be supposed. The rule stands upon a much higher plane, for it arises out of the very nature and ground of the inquiry into the proceedings of the state tribunals, and touches closely upon the relations between the state and the Federal governments. As was declared by this court in **Ex Parte Royall,** 117 U. S. 241, 252- Applying in a habeas corpus what was said in **Covell v. Heyman,** 111 U. S. 176, 182 a case of jurisdiction: "the forbearance which courts of coordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States it is something more. It is a principle of right and of law, and, therefore, of necessity." And see in re **Tyler, Pe-**

titioner, 149 U. S. 164, 186."

Page 333.

"Whatever question is raised about the jurisdiction of the trial court no doubt is suggested but that the Supreme Court had full jurisdiction to determine the matters of fact and the questions of law arising out of this alleged disorder; nor is there any reason to suppose that it did not fairly and justly perform its duty. It is not easy to see why appellant is not, upon general principles, bound by its decision. It is a fundamental principle of jurisprudence, arising from the very nature of courts of justice and the objects for which they are established, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties **Southern Pacific Railroad v. United States,** 168 U. S. 1, 48. The principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction. As to its application, in habeas corpus cases, with respect to decisions by such courts of the facts pertaining to the jurisdiction over the prisoner, see Ex parte **Terry,** 128 U. S. 289, 305, 310; Ex parte

Columbia George, 144 Fed. Rep. 985, 986."

Page 344:

"4. To conclude: Taking appellant's petition as a whole, and not regarding any particular portion of it to the exclusion of the rest—dealing with its true and substantial meaning and not merely with its superficial import—it shows that Frank, having been formally accused of a grave crime, was placed on trial before a court of competent jurisdiction, with a jury lawfully constituted; he had a public trial, deliberately conducted, with the benefit of counsel for his defense; he was found guilty and sentenced pursuant to the laws of the State; twice he has moved the trial court to grant a new trial, and once to set aside the verdict as a nullity; three times he has been heard upon appeal before the court of last resort of that state, and in every instance the adverse action of the trial court has been affirmed; his allegations of hostile public sentiment and disorder in and about the court-room, improperly influencing the trial court and the jury against him, have been rejected because found untrue in point of fact upon evidence presumably justifying that finding, and which he has not produced in the present proceeding;

his contention that his lawful rights were infringed because he was not permitted to be present when the jury rendered its verdict, has been set aside because it was waived by his failure to raise the objection in due season when fully cognizant of the facts. In all of these proceedings the State, through its courts, has retained jurisdiction over him, has accorded to him the fullest right and opportunity to be heard according to the established modes of procedure, and now holds him in custody to pay the penalty of the crime of which he has been adjudged guilty. In our opinion, he is not shown to have been deprived of any right guaranteed to him by the Fourteenth Amendment or any other provision of the Constitution or laws of the United States; on the contrary, he has been convicted, and is now held in custody, under "due process of law" within the meaning of the Constitution."

According to the decisions of the Supreme Court of the State of Georgia a second habeas corpus brought in the state courts between the same parties, with substantially the same questions as the first one, would be subject to plea of res adjudicata. In connection with the above, we wish to cite the

case of **Perry et al v. McLendon,** Sheriff, 62 Ga. Reports, 598 (1):

> "HABEAS CORPUS—JUDGMENT — RES ADJUDICATA. — Judgment on habeas corpus being in this state subject to review, especially where the imprisonment is on civil process, is final until reversed; and where the legality of the same cause of imprisonment is twice drawn in question between the same parties by successive writs of habeas corpus before the same court, or before different courts of competent original jurisdiction, the judgment on the former writ may be answered in bar of a discharge under the latter. The matter will be deemed res adjudicata as to all points which were necessarily involved in the general question of the legality or illegality of the arrest and detention, whether all of them were actually presented or not. It is sufficient if they might have been and ought to have been presented in the exercise of due diligence."

And also an excerpt from the opinion of this court in this case, beginning on page 603:

> "It would seem from the authorities, or some of them, (see Heard on Habeas Corpus) that where there is no such power of

review, there may be one writ of habeas corpus after another ad infinitum. But if there can be a review, is there any reason, especially in civil cases, in which the struggle is between party and party, and not with the king or commonwealth on one side, and the subject or citizen on the other, why the first adjudication, if acquiesced in, should not be final and conclusive? We can think of none. Such is the general rule of law, in other cases, and why cases of habeas corpus should not be included in its application, we cannot perceive or divine. Should the legality of an imprisonment in a civil case forever be and remain an open question, so long as the restraint continues? Is there no way to close it, and ought there to be none? Is liberty so precious? There is no such indulgence to anything else, not even to life itself. A single judgment will serve to hang a man, if left to stand unreversed. He cannot have trial after trial to ascertain if he is guilty, and determine whether he is to be executed. One complete trial, fair and legal, will carry him out of the world; and why should it not suffice to keep him in jail until some new right to a deliverance has arisen? Is the same alleged right to be investigated over and over, each time afresh, just as if no prior investigation had taken place? Is the grievance, real or supposed, of a prisoner the stone of

Sisyphus which courts can never bring to a place of rest? and if called to lift it up the same hill as often as it rolls down, must they comply? Doubtless there is an obligation to issue the writ of habeas corpus whenever, and as often as, it may be applied for, provided the petition contains the requisite matter, is in due form, duly authenticated, duly presented, and does not show on its face that the imprisonment, though complained of as illegal, is in fact legal. Code 4012. But when it appears, on the return or at the hearing, that the legality of the imprisonment has already been adjudicated upon a previous writ between the same parties, by a competent tribunal, the production of that judgment is the end of controversy. Further writs may be applied for and issued, but to each and all of them the one valid and subsisting judgment will be a conclusive answer, as to any and all objections to the legality of the restraint which were embraced in the first petition, or which could and should have been embraced in it. The effect of a judgment cannot be avoided by a difference in the pleadings, when those in the pleadings, when those in the first case could and should have been as full as those in the second, though in fact they were not. No party, plaintiff, or defendant, is permitted to stand his case before the court on some of

its legs, and if it falls, set it up again on the rest in a subsequent proceeding, and thus evade the bar of the former judgment. It is the body of a case and not certain of its limbs only, that the final judgment takes hold upon. Whoever brings the legality of an imprisonment into question by writ of habeas corpus, should, in the first instance, show as much cause for his attack as he can. He must discharge all his weapons, and not reserve a part of them for use in a future reencounter. He must realize that one defeat will not only determine the campaign, but end the war."

Should not petitioner have taken a direct appeal from the State Courts to the United States Supreme Court instead of attacking the judgment of the State Courts collaterally by writ of habeas corpus?

As to the third issue which we say is herein involved, that petitioner should not have attacked the judgment of the courts of Georgia collaterally, but should have taken a direct appeal from the State Courts to the Supreme Court of the United States, we note that in the cases cited by petitioner of **Chambers v. Florida,** 309 U. S. 221; **Ward v. Texas,** 86 L. ed (no. 15 Advanced Sheets) 1101; **Brown v. Mississippi,** 297 U. S. 278; **White v. Texas,** 310

U. S. 530, direct appeals were taken from the court of last resort in the state to the Supreme Court of the United States, and the judgments of the court of last resort, in the states referred to, were not attacked collaterally by a writ of habeas corpus.

In our search of United States Supreme Court decisions we have noted the reluctance with which they set aside the judgments of the state courts.

In **Rogers v. Peck,** 199 U. S. 425, on page 434 in the opinion of the court Mr. Justice Day said as follows:

> "The reluctance with which this court will interfere with a state in the administration of its domestic law for prosecution of criminals has been frequently stated in the deliverances of the court upon the subject. It is only when fundamental rights especially secured by the Federal Constitution are invaded that such interference is warranted."

In this case petitioner brought habeas corpus on the grounds that her death sentence for murder had not been put in proper form by the courts of Vermont, or the Governor.

In **Felts v. Murphy, Warden,** 201 U. S. 123 the United States Supreme Court held, in an appeal from

a death penalty conviction of murder, in an Illinois court:

> "Wherein the criminal trial of a person compos mentis but almost totally deaf, the state court has jurisdiction of the subject matter and of the person, and also to direct and enforce the judgment which was entered, the jurisdiction is not lost by any irregularities caused by failure of the court to have the testimony repeated to the accused through an ear trumpet, nor is the accused thereby deprived of his liberty without due process of law in violation of the Fourteenth Amendment. Even though the case be a hard one, Federal Courts cannot on Habeas Corpus proceedings grant relief from the judgment; their power is limited to the question of jurisdiction. The writ of Habeas Corpus cannot perform the functions of a writ of error."

In **Sorti v. Massachusetts**, 183 U. S. 138 the question raised by appellant on habeas corpus from the judgment of the state court, in an appeal from a death penalty conviction of murder, was that a convicted party, under a state statute, had a year in which to file a motion for a new trial, and therefore the sentence should not be executed against him. In this case, in the opinion of the court, by Mr. Justice

Brewer, on page 141, it was held:

> "Appeals for the writ have been made and appeals taken from refusals to grant it, quite destitute of meritorious grounds and operating only to delay the administration of justice. It is an attempt to substitute a writ of habeas corpus for a writ of error and to review the proceedings in a criminal case in the state court by collateral attack rather than by direct proceedings in error—something this court has repeatedly said ought seldom to be done."

CONCLUSION

In view of the fact that petitioner's claim of coercion in his confession rests upon his uncorroberated testimony alone, in view of the fact that he has already raised the same issues in a former writ of habeas corpus, filed in the City Court of Reidsville, Georgia, and that the issues there raised have been adjudicated against him by the highest court of the land, the respondent respectfully submits that the findings of fact and the conclusions of law discharging the writ of habeas corpus are correct and is the only proper decision according to the record that could be made by the court below. Wherefore, it is

urged that the petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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